

# What does a Bolsonaro Presidency mean for Brazilian Law? Part 2: the Reforms and the Court

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## 1. The Ball is in your Court

In our previous post, we discuss four legislative changes that are, at the same time, likely to be enacted in a Bolsonaro presidency and constitutionally suspect: (1) repealing gun control legislation; (ii) lowering of the minimum age for criminal responsibility; (iii) prohibiting “ideological discourse” in schools; (iv) legalizing the shooting of suspects, during police operations, in circumstances beyond the scope of regular self-defense. The lawsuits that will inevitably challenge each of these measures have, as a matter of current law, different likelihoods of success. But, to some extent, all of them will force the Court to choose between (1) “silence”, (2) “rubberstamping”, and (3) “conflict”.

The Brazilian judicial review system is complex, comprising both concrete (through appeals) and abstract review (through direct suits) tracks, and both will be used by opponents of these measures. Across all the several different kinds of procedures, however, from appeals to direct challenges, [the Court has very effective mechanisms of avoidance at its disposal](#). Mechanisms for agenda control [are allocated in a very individualistic fashion in the Court](#). Each case has a judge-rapporteur, with discretion to determine when the case is “ready” for judgment; moreover, even after the Court begins to rule on a case, any of the other Justices can ask for time to analyze it more carefully and, as such, delay a final ruling indefinitely. Furthermore, the Court has hundreds of thousands of cases pending judgment, and, as such, has a large discretion to decide what it chooses to judge in any given day. A bottomless docket, combined with no deadlines to rule on any specific lawsuit, gives the Justices great leeway in only deciding what they want to decide.

In this scenario, it is perfectly possible, and even likely, that the Court will take years to rule on a given controversial or politically sensitive issue.

On the other hand, since individual Justices have ample injunction powers, the collective silence can be pierced by an individual decision by a judge-rapporteur who happens to have strong views against one of these laws [and decides to individually suspend it](#). Such individual injunctions are far from rare in Brazil, which would either change the meaning of the collective silence of the Court or force it to decide the issue immediately.

The other two options – “rubberstamping” and “conflict” – pose other types of challenges to the Court.

Although we disagree with all the measures proposed by Bolsonaro, there are at least conceivable versions of some of them that would not be necessarily unconstitutional – with the exception of the legalization of extrajudicial killings. Validation by the Supreme Court of any of these measures, however, is expected to jeopardize the Court’s standing in the legal community, and in particular the Justices’ cherished narrative of a liberal, progressive, minority-protecting Court.

Regarding the possibility of conflict, the Supreme Court has typically avoided direct clashes with the president – *any* president. In any case, if forced to decide one or more of these issues, the Court will certainly trigger conflict with Bolsonaro and his supporters inside and outside of Congress. This is especially true in the case of the “shoot on sight” laws – a measure which is very symbolic, very radical, and also clearly unconstitutional, leaving the Court with little room to find more moderate decisions instead of a full invalidation.

Here, the Court would be threading new and dangerous territory, the likes of which Brazilian constitutional law has never seen since democratization. All-out judicial attacks on signature, ideologically charged legislation, supported by both a majority of Congress and the President would be a new scenario in Brazil. Although the Court praises its rights-protecting jurisprudence, most of the decisions celebrated in this narrative involve judicial *confirmation* of progressive legislation (as in the case of affirmative actions) or establishing rights in areas where there is not enough congressional support for legislation, but also not enough opposition in Congress and in Presidency to trigger retaliation. This has been the case, for example, in the cases allowing abortion of anencephalic fetuses and establishing the right to same-sex unions.

## 2. The President strikes back?

A conflict of this sort would be risky for the Court – but it might be a good thing for Bolsonaro. Populist leaders thrive through conflict, and one like this could help to keep his base fired up. The invalidation of any of these statutes could easily be painted as the act of an aloof, soft-on-crime, liberal, left-leaning elite who is estranged from majority values. Such conflicts could be used to fuel “transformative” nominations to the Court, especially considering that the current composition has been mostly appointed by the two previous presidents, from the Workers’ Party – the direct antagonist of Bolsonaro and his supporters.

Bolsonaro has already complained of the current Supreme Court during the presidential campaign. He has [mentioned the possibility of aggressively packing the Court, by enlarging it from its current size of 11 to 21](#), thus giving himself the possibility of immediately appointing 10 new Justices.

This proposal is farfetched – but still within the realm of possibility, depending on the political circumstances. A perfect storm – including a president with low

respect for institutions, a conservative congress, and popular criticism of the Court – could lead to such an amendment gaining traction. The fact that such a proposal, which would not have been even seriously discussed a couple of years ago, is now requiring public criticism and is yet another good illustration of the effects a Bolsonaro presidency would have on the Brazilian constitutional order.

The Supreme Court would have to review the constitutionality of such an amendment. The constitutionality of packing the Court, even in systems without express eternity clauses, is problematic. In the case of Brazil, we believe that such an aggressive measure, especially if it granted the current President the power to appoint an automatic majority in the new Court, would seriously jeopardize the separation of powers, thus violating an “eternity clause” of the Brazilian constitution. Moreover, if comparative constitutional law teaches something in this area, it is that constitutional courts tend to be particularly protective of their own powers and independence. The Brazilian Court has been no exception. Altogether, a move like this would have an extremely high likelihood of being declared unconstitutional, unless the Court capitulates, behaving strategically out of fear of inviting even more radical attacks.

Like the challenges to the signature statutes themselves packing the Court – or, less aggressively, diminishing its jurisdiction – would put before the Court a second round of the same game, but this time, silence would not be a possible alternative. The choice between rubberstamping or doubling down on the political conflict would determine the very survival of the Brazilian constitutional democracy.

### **3. An unstable Presidency?**

A Bolsonaro presidency might have many other implications for Brazilian democracy that we do not directly discuss here. For example, on the symbolic level, his words and deeds matter, even if no laws are passed. He notoriously claimed, in 2017, that “the minority must bow down before the majority”. [Hate speech and political violence seem to be on the rise in the last few months](#), and there is widespread concern about a potential increase in discourses and practices of discrimination and even violence against minorities.

On the institutional level, it is still unclear whether the post-election conditions we described in the first section will lead to political stability. As two political scientists have recently observed, although the conditions for establishing and managing a legislative coalition are [very favorable for Bolsonaro’s ideological preferences, he has been campaigning against the adoption of standard coalition-building practices](#). His anti-establishment outlook is, at least in discourse, hostile to bargaining with “traditional” politicians and parties, and he promised to assemble a cabinet with “notables” and “experts”, instead of using appointments to secure political support across party and ideological lines.

Bolsonaro does not *need* to confront Congress, then, much less to resort to anti-democratic means and threats, to promote the core parts of his legislative agenda. This is also true in the economic sphere. The “new” Congress is likely to support

him regardless of his policies in this area being more liberal and austerity-oriented (as he promised during the campaign), but the “older” parts will be sympathetic to the statist and corporatist stance he had consistently adopted for most of his two decades in Congress. The open question, then, is what Bolsonaro’s approach will be, and whether he will be successful either in adopting traditional strategies for building a coalition or in assembling a cabinet of “independents” and speaking out directly to the people. Furthermore, whatever the strategy, Bolsonaro has cultivated a public *persona* centered on voluntarism, impatience, and populism. Even if Congress will not be a relevant veto to his conservative agenda, the other institutional conflicts that his reforms might create – especially with the Supreme Court, [and perhaps with the independent Attorney-General’s office](#) – might lead to constant and arguably dangerous rounds of populist appeals to the people against the “corrupt” establishment.

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